

Hon. Barbara J. Rothstein

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

MARLI BROWN and LACY SMITH,

Plaintiffs,

v.

ALASKA AIRLINES, INC., and  
ASSOCIATION OF FLIGHT  
ATTENDANTS-CWA, AFL-CIO,

Defendants.

CASE NO. 22-CV-00668-BJR

**AGREEMENT REGARDING  
DISCOVERY OF ELECTRONICALLY  
STORED INFORMATION AND  
PROPOSED ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

**A. General Principles**

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. As provided in LCR 26(f), the proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the

1 application of the proportionality standard in discovery, requests for production of ESI  
2 and related responses should be reasonably targeted, clear, and as specific as possible.

3 **B. ESI Disclosures**

4 Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each  
5 party shall disclose:

6 1. Custodians. The custodians most likely to have discoverable ESI in their  
7 possession, custody, or control, which will include at least the number of custodians  
8 identified in each party's initial disclosures. The custodians shall be identified by name,  
9 title, connection to the instant litigation, and the type of the information under the  
10 custodian's control.

11 2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared  
12 drives, servers), if any, likely to contain discoverable ESI.

13 3. Third-Party Data Sources. A list of third-party data sources, if any, likely to  
14 contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud  
15 storage) and, for each such source, the extent to which a party is (or is not) able to preserve  
16 information stored in the third-party data source.

17 4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI  
18 (by type, date, custodian, electronic system or other criteria sufficient to specifically  
19 identify the data source) that a party asserts is not reasonably accessible under Fed. R.  
20 Civ. P. 26(b)(2)(B).

21 **C. ESI Discovery Procedures**  
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1       1.     On-site inspection of electronic media. Such an inspection shall not be required  
2       absent a demonstration by the requesting party of specific need and good cause or by  
3       agreement of the parties.

4       2.     Search methodology. The parties shall timely confer to attempt to reach agreement  
5       on appropriate search terms and queries, file type and date restrictions, data sources  
6       (including custodians), and other appropriate computer- or technology-aided  
7       methodologies, before any such effort is undertaken. The parties shall continue to  
8       cooperate in revising the appropriateness of the search methodology.

9           a.     Prior to running searches:

10           i.     The producing party shall disclose the data sources (including  
11           custodians), search terms and queries, any file type and date restrictions,  
12           and any other methodology that it proposes to use to locate ESI likely to  
13           contain responsive and discoverable information. The producing party may  
14           provide unique hit counts for each search query.

15           ii.    The requesting party is entitled to, within 14 days of the producing  
16           party's disclosure, add no more than 10 search terms or queries to those  
17           disclosed by the producing party absent a showing of good cause or  
18           agreement of the parties.

19           iii.   The following provisions apply to search terms / queries of the  
20           requesting party. Focused terms and queries should be employed; broad  
21           terms or queries, such as product and company names, generally should be  
22           avoided. A conjunctive combination of multiple words or phrases (*e.g.*,  
23           “computer” and “system”) narrows the search and shall count as a single  
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1 search term. A disjunctive combination of multiple words or phrases (*e.g.*,  
2 “computer” or “system”) broadens the search, and thus each word or  
3 phrase shall count as a separate search term unless they are variants of the  
4 same word. The Producing Party may identify each search term or query  
5 returning overbroad results demonstrating the overbroad results and a  
6 counter proposal correcting the overbroad search or query. A search that  
7 returns more than 250 megabytes of data, excluding Microsoft PowerPoint  
8 files, audio files, and similarly large file types, is presumed to be  
9 overbroad.

10 b. After production: Within 21 days of the producing party notifying the  
11 receiving party that it has substantially completed the production of documents  
12 responsive to a request, the requesting party may request no more than 10  
13 additional search terms or queries. The immediately preceding section (Section  
14 C(2)(a)(iii)) applies.

15 3. Format.

16 a. ESI will be produced to the requesting party with searchable text, in a  
17 format to be decided between the parties. Acceptable formats include, but are not  
18 limited to, native files, multi-page TIFFs (with a companion OCR or extracted text  
19 file), single-page TIFFs (only with load files for e-discovery software that includes  
20 metadata fields identifying natural document breaks and also includes companion  
21 OCR and/or extracted text files), and searchable PDF.

1 b. Unless otherwise agreed to by the parties, files that are not easily converted  
2 to image format, such as spreadsheet, database, and drawing files, will be produced  
3 in native format.

4 c. Each document image file shall be named with a unique Bates Number.  
5 File names should not be more than twenty characters long or contain spaces.  
6 When a text-searchable image file is produced, the producing party must preserve  
7 the integrity of the underlying ESI, *i.e.*, the original formatting, the metadata (as  
8 noted below) and, where applicable, the revision history.

9 d. If a document is more than one page, the unitization of the document and  
10 any attachments and/or affixed notes shall be maintained as they existed in the  
11 original document.

12 e. The parties shall produce their information in the following format: single-  
13 page images and associated multi-page text files containing extracted text or with  
14 appropriate software load files containing all information required by the litigation  
15 support system used by the receiving party.

16 f. The full text of each electronic document shall be extracted (“Extracted  
17 Text”) and produced in a text file. The Extracted Text shall be provided in  
18 searchable SCII text format (or Unicode text format if the text is in a foreign  
19 language) and shall be named with a unique Bates Number (*e.g.*, the unique Bates  
20 Number of the first page of the corresponding production version of the document  
21 followed by its file extension).

22 4. De-duplication. The parties may de-duplicate their ESI production across custodial  
23 and non-custodial data sources after disclosure to the Requesting Party, and the duplicate  
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1 custodian information removed during the de-duplication process tracked in a  
2 duplicate/other custodian field in the database load file.

3 5. Email Threading. The parties may use analytics technology to identify email  
4 threads and need only produce the unique most inclusive copy and related family members  
5 and may exclude lesser inclusive copies. Upon reasonable request, the Producing Party  
6 will produce a less inclusive copy.

7 6. Metadata fields. If the Requesting Party seeks metadata, the parties agree that only  
8 the following metadata fields need be produced, and only to the extent it is reasonably  
9 accessible and non-privileged: document type; custodian and duplicate custodians (or  
10 storage location if no custodian); author/from; recipient/to, cc and bcc; title/subject; email  
11 subject; file name; file size; file extension; original file path; date and time created, sent,  
12 modified and/or received; and hash value. The list of metadata type is intended to be  
13 flexible and may be changed by agreement of the parties, particularly in light of advances  
14 and changes in technology, vendor, and business practices.

15 7. Hard-Copy Documents. If the parties elect to produce hard-copy documents in an  
16 electronic format, the production of hard-copy documents will include a cross-reference  
17 file that indicates document breaks and sets forth the custodian or custodian/location  
18 associated with each produced document. Hard-copy documents will be scanned using  
19 Optical Character Recognition technology and searchable ASCII text files will be  
20 produced (or Unicode text format if the text is in a foreign language), unless the Producing  
21 Party can show that the cost would outweigh the usefulness of scanning (for example,  
22 when the condition of the paper is not conducive to scanning and will not result in accurate  
23 or reasonably useable/searchable ESI). Each file will be named with a unique Bates  
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1 Number (*e.g.*, the unique Bates Number of the first page of the corresponding production  
2 version of the document followed by its file extension).

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5 **D. Preservation of ESI**

6 The parties acknowledge that they have a common law obligation, as expressed in Fed. R.  
7 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in  
8 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree  
9 as follows:

10 1. Absent a showing of good cause by the Requesting Party, the parties shall not be  
11 required to modify the procedures used by them in the ordinary course of business to back-  
12 up and archive data; provided, however, that the parties shall preserve all discoverable  
13 ESI in their possession, custody, or control.

14 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.  
15 26(e) with discoverable ESI responsive to a particular discovery request or mandatory  
16 disclosure where that data is created after a disclosure or response is made (unless  
17 excluded under Sections (D)(3) or (E)(1)-(2)).

18 3. Absent a showing of good cause by the Requesting Party, the following  
19 categories of ESI need not be preserved:

20 a. Deleted, slack, fragmented, or other data only accessible by forensics.

21 b. Random access memory (RAM), temporary files, or other ephemeral data  
22 that are difficult to preserve without disabling the operating system.

23 c. On-line access data such as temporary internet files, history, cache,  
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cookies, and the like.

d. Data in metadata fields that are frequently updated automatically, such as last-opened dates (see also Section (E)(5)).

e. Back-up data that are duplicative of data that are more accessible elsewhere.

f. Server, system, or network logs.

g. Data remaining from systems no longer in use that is unintelligible on the systems in use.

h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that a copy of all such electronic data is automatically saved in real time elsewhere (such as on a server, laptop, desktop computer, or “cloud” storage).

**E. Privilege**

1. A producing party shall create a privilege log of all documents fully withheld from production on the basis of a privilege or protection, unless otherwise agreed or excepted by this Agreement and Order.

a. Privilege logs shall include the following fields: “Bates Number,” “To,” “From/Author,” “CC,” “BCC,” and “Date” as well as the specific privilege or protection claimed, the type of document (*e.g.*, “email reflecting legal advice ...”) and general subject matter of the document (*e.g.*, “... legal advice regarding [topic]”).



1           b.       If a family of documents is entirely privileged, each document in the family  
2           shall be listed on the log separately. The family relationship for all documents on  
3           the log shall be indicated on the log. If a family of documents exists that contains  
4           both privilege and non-privileged documents, the parties agree that the privileged  
5           documents in the family may be replaced with a slip sheet indicating, "Withheld  
6           for Privilege." The withheld document shall be logged and the remaining non-  
7           privileged documents in the family shall be produced. The Bates number of the  
8           slip sheet for the withheld document shall be provided on the log.

9           c.       For ESI, the privilege log may be generated using available metadata,  
10          including author/recipient or to/from/cc/bcc names; the subject matter or title; and  
11          date created. Should the available metadata provide insufficient information for  
12          the purpose of evaluating the privilege claim asserted, the Producing Party shall  
13          include such additional information as required by the Federal Rules of Civil  
14          Procedure.

15          d.       Privilege logs will be produced to all other parties no later than 30 days  
16          after delivering a production unless an earlier deadline is agreed to by the parties.

17       2.       Redactions need not be logged so long as the basis for the redaction is clear on the  
18       redacted document.

19       3.       With respect to privileged or work-product information generated after the filing  
20       of the original complaint, parties are not required to include any such information in  
21       privilege logs.

22       4.       Activities undertaken in compliance with the duty to preserve information are  
23       protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this proceeding shall not, for the purposes of this proceeding or any other federal or state proceeding, constitute a waiver by the producing party of any privilege applicable to those documents, including the attorney-client privilege, attorney work-product protection, or any other privilege or protection recognized by law. Information produced in discovery that is protected as privileged or work product shall be immediately returned to the producing party, and its production shall not constitute a waiver of such protection.

**F. Miscellaneous Provisions**

1. Where disputes arise concerning any issues addressed in this Order, the parties shall promptly meet and confer in an effort to reach agreement prior to seeking leave of the Court to resolve any disputed issues. If the parties' disagreement persists after meeting and conferring in good faith, the parties shall notify the Court of their unresolved dispute(s) and seek resolution from the Court, as set forth in the Court's Standing Order.

2. All parties reserve all rights under applicable law for matters relating to the production of documents or ESI that are not specifically addressed in this Order, including the right to object to production of any documents or ESI. Nothing in this Order shall be construed to affect in any way the rights of any party to object to the admissibility of any materials into evidence at the trial of this Action.

4. Nothing in this Order is intended or should be interpreted as narrowing, expanding, or otherwise affecting the rights of the parties or third parties to object to a subpoena or discovery request.

5. By stipulating to the entry of this Order, no Producing Party waives any right it otherwise might have to object to disclosing or producing any information or item.

6. Nothing in this Order alters a party's legal obligation to retain documents and data.

DATED: Oct. 4, 2022

/s/ Joel B. Ard

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DATED: Oct. 4, 2022

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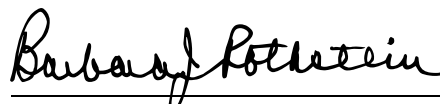
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**ORDER**

PURSUANT TO STIPULATION, IT IS SO ORDERED

DATED this 5<sup>th</sup> day of October, 2022.



Barbara Jacobs Rothstein  
U.S. District Court Judge